No. 21385

United States Court of Appeals

for the Ninth Circuit

BERNARD HENRY OLIVER, JR.

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

On Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF OF APPELLEE

SIDNEY I. LEZAK,
United States Attorney
District of Oregon

GANN PUBLISHING CO., PORTLAND, OREGON 5-4-67

INDEX

INDEX OF CITATIONS

CASES

No. 21385

United States
Court of Appeals
for the Ninth Circuit

BERNARD HENRY OLIVER, JR.

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

On Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF OF APPELLEE

COUNTER-STATEMENT OF THE CASE

On February 2, 1966, appellant came into the Citizen's Branch of the U.S. National Bank of Oregon at Portland, Oregon and handed a teller a blank deposit slip and a note which instructed the teller to put money in a paper bag which he handed her. (R. 8).[1]

[1]References to the two-volume trial transcript will be designated "R".

The teller attempted to look at him as she placed the money in the bag so that she could identify him although appellant told her several times to stop looking up. (R. 12).

He walked out of the bank in a normal manner there was nothing unusual about his speech or tone of voice, no odor of alcohol was detected on his breath and there was nothing unusual about his eyes. (R. 13).

To the teller he seemed "pretty calm like any depositor coming in to make a deposit." (R. 14)

The appellant gave a statement to the F.B.I. in which he acknowledged that he had a small pocket knife in his jacket pocket and that he had prepared a note before coming into the bank which stated,

> "Put all your money in this bag, don't give an alarm until after I've left. I'm armed." (R 33, 34).

When appellant took the witness stand he denied having made the statement that he had prepared the note before coming into the bank, but admitted that he knew that this was in the statement which was given to the F.B.I. and signed by him. (R. 95)

I.

THE COURT APPLIED THE CORRECT TEST OF INSANITY IN INSTRUCTING THE JURY

Appellant does not contend that the instructions given by the court as to the test to be applied in determining insanity were incorrect under the applicable precedents in this circuit or that the evidence was insufficient to justify a finding of sanity under the applicable law.

This court has refused other recent invitations to reverse convictions because of the use of these tests. In *Smith* v. *U.S.*, 342 F.2d 725, the court reiterated the position taken in *Sauer* v. *U.S.*, 241 F.2d 640 (9th Cir. 1957) that this court would leave any drastic change to higher judicial authority or to Congress.

Since the trial of this case, this court has stated in *Maxwell* v. *U.S.*, 368 F.2d 743 that it "express(es) no opinion as to the correctness of .. . . the A.L.I. proposal or variations of that proposal, nor do we now indicate either approval or disapproval of the *Davis* instruction, followed in *Andersen* and *Sauer*."

Since this court's decision in *Maxwell* (supra) the Court of Appeals for the 8th Circuit has decided *Pope* v. *U.S.*, 372 F.2d 710. This case is particularly instructive because of its review of recent changes

in the decisional law and an approach which reflects a view consonant with the realities of the trial setting. That court takes the position that if the "elements of knowledge, will and choice are emphasized in the charge as essential and critical constituents of legal sanity, we shall usually regard the charge as legally sufficient." 372 F.2d 710, 736.

The court says that it expects that if the above elements are covered, a jury would reach the same conclusion no matter which of the various tests, except for the Durham rule, were used. The court holds that the instructions in that case, which used the same tests applied here, did cover the required areas and affirmed.

In view of the number of times that this court has recently considered the issue presented by this assignment and the plethora of materials before the court in the decisions cited appellee will refrain from further discussion of the law at this point.

There is nothing in this simple bank robbery case that compels a change of so drastic a nature in our test for insanity that reversal should be ordered. If the teachings of the *Pope* case were to be followed, the failure of the court to give instructions under the A.L.I. code if preferred by the court would be harmless error since the trial court here included all the elements required by that case.

II.

THE INSTRUCTION OF THE COURT AS TO THE QUANTUM OF EVIDENCE NECESSARY TO OVERCOME THE PRESUMPTION OF SANITY WAS INVITED BY APPELLANT AND IS NOT REVERSIBLE ERROR

Not only was no exception taken by the appellant's counsel to this part of the court's instructions, but the very language used was taken from appellant's Requested Instruction No. 6-A submitted as an appendix to appellant's motion which has been forwarded by the Clerk of the District Court as a supplemental transcript.

In any event the court clearly instructed the jury that it was the government's burden to prove sanity beyond a reasonable doubt and the jury could not have been misled by this instruction.

III.

IT WAS NOT ERROR FOR THE COURT TO EXCLUDE TESTIMONY BY APPELLANT'S WIFE MRS. OLIVER AS TO HIS CONDITION LONG AFTER THE CRIME

In order to properly appreciate the inappropriateness of appellant's objection on this score, it should suffice to refer to the proceedings in court.

Mrs. Oliver was called by the defense as a witness and stated that she married appellant two

days after the robbery on February 4, 1966, having met him for the first time on February 3, 1966.

The balance of the direct examination pertinent to this assignment follows:

"Q You knew him for one day, and then you got married, is that it?

A Yes, sir.

Q When was the first time that you knew your husband had been involved in a bank robbery?

A About thirty days ago. I didn't know it until after he had already turned his self in. I read it in the paper.

Q Had you noticed anything about your husband's conduct, the way he acted prior—before he went down and turned himself in?

A Yes, I did. I gave it a lot of consideration too.

Q Would you tell the jury what you noticed, Mrs. Oliver?

THE COURT: How would that prove his condition at the time of the event?

MR. YORK: Well, my only feeling was, your Honor, it might show—it would have some indication what his mental situation was.

THE COURT: When?

MR. YORK: I realize it was well after the robbery, your Honor.

THE COURT: This was four months ofter the robbery. If there is any question about the alleged confession or admission, that would be relevant. But, I just don't know what relevancy it would have to proving that he was either sane or insane on February 2nd. Perhaps what his attitude or mental condition was on February 3rd might have some relevancy. But what his mental condition was in May and June, I can't see it.

MR. YORK: All right." (R. 71, 72).

Thereafter Mrs. Oliver was permitted to testify as to her husband's conduct and drinking habits during the period after the robbery. (R. 72, 73).

The government contends that the appellant got everything from the witness to which he was entitled and that no error was committed by the court in limiting the witness to a period which was relevant to the inquiry.

CONCLUSION

It is respectfully submitted that the assignments of error are without substantial merit and that the judgment and conviction of appellant should be affirmed.

Dated this 4th day of May, 1967.

SIDNEY I. LEZAK
United States Attorney
District of Oregon

CERTIFICATE

I certify that in connection with the preparation f this brief, I have examined Rules 18 and 19 of the nited States Court of Appeals for the Ninth Cir- uit, and that in my opinion, the foregoing brief is full compliance with those rules.

Dated this 4th day of May, 1967.

SIDNEY I. LEZAK
United States Attorney